from whom he had obtained the information. So, strictly, this portion of the evidence should be disregarded.

Having stated the foregoing, I must point out that nowhere in the affidavits of the plaintiffs was this objection raised. Neither was it raised in arguments before the senior assistant registrar who first heard the application and on whose decision the appeal had come before me. In my view, the plaintiffs must be taken to have waived the requirement of strict proof. I think I am fortified in so holding by the following passage in the judgment of Cotton LJ in *Gilbert* v *Endean*[7] where he said (at p 268):

> In my opinion, therefore, on such applications, if an affidavit on information and belief is made, the other side is not called upon to answer it under the peril of its being said to him, 'You have in fact admitted this by not denying it, and therefore the court may act upon the admission'. But I must add this: where in the court below the evidence not being strictly admissible, not being that upon which the court can properly act, if the person against whom it is read does not object, but treats it as admissible, then before the Court of Appeal, in my judgment, he is not at liberty to complain of the order on the ground that the evidence was not admissible. But in such a case the court does not act on the statement as being evidence properly admissible, but because the party has by the course which he adopted waived proof of the facts stated on information and belief.

This statement of the law was also cited with approval in *Rossage* v *Rossage*.[6]

Appeal dismissed.

Solicitors: *Tan Lee & Partners*; *Lee & Lee*.

Reported by *Terence Tan Bian Chye*

Invar Realty Pte Ltd v Kenzo Tange Urtec Inc & Anor

HIGH COURT (SINGAPORE) — SUIT NOS 983 AND 3223 OF 1987
YONG PUNG HOW J
5 SEPTEMBER 1990

Civil Procedure — Counterclaim — Defendants counterclaiming in respect of professional fees — Claim admitted by plaintiffs — Whether defendants entitled to summary judgment — Rules of the Supreme Court 1970, O 14

Civil Procedure — Pleadings — Amendment of defence to counterclaim — Summary judgment entered on counterclaim — Whether plaintiff entitled to amend defence after final judgment — Rules of the Supreme Court 1970, O 20 r 5

The plaintiffs were the developers of a building. The first defendants were the architects and were appointed by the plaintiffs as the principal consultants for the building project. The second defendants were the civil and structural engineers appointed by the first defendants for the building project. The design of the building provided for two special features. One of these features caused problems which led to delay and remedial works. The plaintiffs brought actions for breach of contract and/or negligence against both defendants which were later consolidated. The second defendants made a counterclaim against the plaintiffs for the balance of professional fees due to them. The plaintiffs in their defence to the counterclaim admitted that such fees were due to the second defendants but that the amount owing was, according to their calculations, $116,585.07, instead of $179,250 as claimed by the second defendants. The plaintiffs also contended that they were entitled to set off against the counterclaim of $116,585.07 so much of their own claim against the second defendants as would satisfy and extinguish the counterclaim.

The second defendants applied under O 14 r 5 for summary judgment for $116,585.07 and obtained judgment from the registrar for this amount, with a stay of execution pending trial of the plaintiffs' claim, and with leave to the plaintiffs to defend the balance of the counterclaim. The plaintiffs appealed against this to the judge-in-chambers. The plaintiffs also applied to amend their defence to the counterclaim, to make it clear that the $116,585.07 would have been payable but for the second defendants' breach of contract and/or negligence. This application was resisted on the ground that that the plaintiffs had made an admission on which judgment could be founded, and that such an amendment could not be made after what was a final judgment had already been entered.

Held, dismissing the plaintiffs' appeals:

(1) If there is no defence to a claim other than a plausible counterclaim, then judgment must be entered on the claim. The overriding consideration is that if the claim is undisputed other than by means of a counterclaim, the claimant must not be put to the expense of proving his claim, even if no great expense would be incurred. The plaintiffs had by their pleadings admitted in the clearest terms that the second defendants' fees were owed to them, computing this to the very last cent. In the circumstances, the second defendants are entitled to judgment with a stay of execution.

(2) While the court had a very wide power of amendment even after judgment, the appropriate cases in which such a power should be exercised must necessarily be very limited. Whether or

not the court should do so will be in the discretion of the court, and will depend on the facts of each case, including in particular, the nature and implications of the amendment sought.

(3) In the present case, the plaintiffs made an admission of fact on which a judgment could be properly founded, and the defendants obtained a regular judgment for the sum admitted by the plaintiffs.

(4) The registrar had dismissed an application to amend the plaintiffs' defence in respect of the admitted sum on the grounds that the plaintiffs could not amend their pleadings after judgment had been entered against them based on that admission in the pleadings. What the plaintiffs are seeking in this appeal was an order which would reverse the order of the registrar and would result in effect in the removal of the admission on which the judgment against them was based. This was not an appropriate case in which an amendment should be allowed.

Cases referred to

1 *Morgan & Son Ltd* v *S Martin Johnson & Co Ltd* [1948] 2 All ER 196 (refd)
2 *Sheppards & Co* v *Wilkinson & Jarvis* (1889) 6 TLR 13 (follld)
3 *Societe des Etains de Bayas Tudjuh* v *Woh Heng Mining Kongsi* [1978] 2 MLJ 267 (refd)
4 *Ronald Quay Sdn Bhd* v *Maheswary Sdn Bhd* [1987] 1 MLJ 322 (refd)
5 *PH Grace Pte Ltd* v *American Express International Banking Corp* [1987] 1 MLJ 437 (refd)
6 *A-G* v *Birmingham Board* (1881) 17 Ch D 685 (distd)
7 *Durham* v *Robertson* [1898] 1 QB 765 (distd)
8 *A-G* v *Garner* [1907] 2 KB 480 (distd)
9 *Singh* v *Atombrook* [1989] 1 All ER 385 (distd)
10 *Hollis* v *Burton* [1892] 3 Ch 226 (refd)
11 *State of Perak* v *Muthukaruppan Chettiar* [1938] MLJ 247 (refd)
12 *Midland Bank Trust Co Ltd* v *Green* (No 2) [1979] 1 All ER 726 (refd)

Legislation referred to

Rules of the Supreme Court 1970 O 2 r 2, O 14 r 5, O 20 r 5

Harish Kumar for the plaintiffs.
Suppramaniam Thulasidas for the second defendants.

Cur Adv Vult

Yong Pung How J: The plaintiffs were the developers of a 28-storey commercial building known as GB Building at 143 Cecil Street, Singapore. The first defendants were the architects who designed the building and were appointed by the plaintiff as the principal consultants for the building project. The second defendants were the civil and structural engineers appointed by the first defendants for the building project.

The design of the GB Building provided for a podium and a tower block with two special features, namely, a column-free tower block and a glass curtain wall from the 5th to the 28th storeys. Problems arose over the curtain wall; it could not be installed, and this led to remedial works and delay. The plaintiffs brought actions for breach of contract and/or negligence against both defendants, which were later consolidated. The claims against both defendants were for very considerable amounts, totalling more than $15m.

After filing their defence, the second defendants obtained an order of court under which they made a counterclaim against the plaintiffs. They alleged that their professional fees had been agreed in writing at 1% of the total building costs of the project. This came to $398,500 of which $219,250 had been paid, leaving a balance due to them by the plaintiffs of $179,250.

In their defence to the counterclaim, the plaintiffs admitted that the total professional fees due to the second defendants had been agreed at 1% of the total building costs of the project. They disagreed however with the second defendants' calculations, contending after a detailed analysis of the counterclaim that the total professional fees came to only $339,057.07 instead of the $398,500 claimed by the second defendants; that of this they had paid $222,450 instead of $219,250, and that the balance due to the second defendants was therefore only $116,585.07 instead of $179,250. Further to this, the plaintiffs then contended in their defence to the counterclaim that they were entitled to set off against the counterclaim of $116,585.07 so much of their own claim against the second defendants as would satisfy and extinguish the counterclaim.

The second defendants applied under O 14 r 5 for summary judgment for the $116,585.07 and obtained judgment from the registrar for this amount, with a stay of execution pending trial of the plaintiffs' claim, and with leave to the plaintiffs to defend the balance sum of the counterclaim. The plaintiffs appealed against this decision to the judge-in-chambers.

The plaintiffs then applied to amend their statement of claim and their defence to the counterclaim. The amendments were, first, to add to their statement of claim a claim for the return of the $222,450 fees paid to the second defendants; and, second, to amend their defence to the counterclaim to make it clear that the $116,585.07 would have been payable to the second defendants but for their breach of contract and/or negligence. The registrar allowed the amendment to the statement of claim, but the second defendants resisted the plaintiffs' attempt to amend their defence to the counterclaim on the ground that the plaintiffs had made an admission on which a judgment could be founded, and that such an amendment could not be made after what was a final judgment had already been entered. The registrar dismissed the plaintiffs' application to amend their defence to the counterclaim, and the plaintiffs also appealed against this decision to the judge-in-chambers.

The issues on these two appeals are (1) whether the registrar was right in giving the second defendants summary judgment for $116,585.07 on their counterclaim;

and (2) whether the registrar was right in dismissing the plaintiffs' application to amend their defence to the counterclaim.

First issue

Mr Kumar for the plaintiffs, in explaining the origins of set-offs, submitted on the first issue that the Insolvent Debtors Relief Act 1729 [UK] and the Debtors Relief Amendment Act 1735 [UK] did not allow a set-off if either of the claims was unliquidated. A plaintiff who had supplied defective goods or services could recover judgment at law on the price. The defendant was left to his remedy in a separate action. Equity intervened in the interests of justice and fairness and developed the plea of abatement — a plea which was not a counterclaim but a pure defence. The price claimed by the plaintiff was to be reduced to the real value of the goods or services supplied, and equity granted an injunction against the plaintiff proceeding at law until the abatement plea had been tried. In that sense, the plea of abatement either reduced or completely extinguished the claim, depending on the trial court's assessment of the value, if any, of the goods or services rendered.

In the present case, Mr Kumar contended that, although the sum of $116,585.07 is admitted to be due to the second defendants, it is subject to a set-off at this stage and can only be said to be notionally and not actually due to the second defendants. The nature of the set-off in these circumstances has a direct effect on the counterclaim, that is, the value of the services rendered, quite apart from any question of damages sustained by the innocent party. It is not simply a matter of setting-off one sum against another. Once a verdict in favour of the plaintiffs is given, the court will have to assess separately, first, the value, if any, of the services rendered by the second defendants and, second, the damages sustained by the plaintiffs. While the language of the defence to the counterclaim as it now stands may give the impression that the plaintiffs are admitting that a sum of $116,585.07 may be deducted from any damages which may ultimately be awarded to them in this action, such an impression is incorrect and is completely contrary to the nature of the set-off as pleaded by the plaintiffs. As such, the defence to the counterclaim, even as it now stands, does not contain such an admission upon which judgment could have been entered; the plaintiffs are therefore entitled to unconditional leave to defend, and the judgment must be set aside. He relied on *Morgan & Son Ltd* v *S Martin Johnson & Co Ltd*;[1] he also referred the court to David F Partlett, *Professional Negligence* (1985) p 343; Philip R Wood, *English and International Set-Off* (1989) pp 103-142.

Mr Thulasidas for the second defendants submitted that the second defendants have a valid claim for their professional fees. The plaintiffs have admitted this to the value of $116,585.07, and the second defendants will prove the balance of their claim at the trial. The plaintiffs have not proved that they in turn have a bona fide counterclaim to the second defendants' counterclaim, and, aside from filing a very bare affidavit alluding to a possible counterclaim for negligence, they have neglected to prove the bona fides of their claim and have therefore failed the tests enunciated in *Sheppards & Co* v *Wilkinson & Jarvis*.[2] The plaintiffs claim that, because of the defendants' negligence, they have suffered damage, but applying the case of *Sheppards* v *Wilkinson*[2] this can only amount to a defence and counterclaim which does not prohibit judgment to be entered for the admitted sum of $116,585.07 with a stay of execution.

In the present case, the plaintiffs' appeal against judgment under O 14 being entered against them for $116,585.07 on the second defendants' counterclaim is based on the plaintiffs' earlier general claim against the second defendants. The principles to be applied, however, are the same as in the other more usual cases where a cross-claim has been raised by a defendant and the court has to decide whether judgment should be entered for the plaintiff, notwithstanding the cross-claim.

In *Sheppards* v *Wilkinson*,[2] the Court of Appeal in England established the principle that, where there is clearly no defence to the plaintiffs' claim but the defendants set up a plausible counterclaim for an amount not less than the plaintiffs' claim, the plaintiffs should not be put to the trouble and expense of proving their claim. The order in such a case should not be leave to the defendants to defend, but should be for judgment for the plaintiffs on the claim with costs, with a stay of execution until trial of the defendants' counterclaim, pending further order. In that case, both claim and counterclaim were closely connected and arose out of the same set of factual circumstances. An action was brought by the plaintiffs, who were brokers on the stock exchange, against the defendants who were interested in purchasing shares in a company. The plaintiffs advanced a sum of £7,500 to the defendants for that purpose, which was admitted. When the plaintiffs sued for this sum of money, the defendants set up certain agreements which they alleged had been entered into between themselves and the plaintiffs, in accordance with which the sum of £7,500 had been advanced, and they counterclaimed for breach of these agreements which they alleged had been obtained by fraud. The master in chambers granted unconditional leave to defend. On appeal to a judge-in-chambers, Bowen LJ granted unconditional leave to defend on the condition of the defendants paying the £7,500 into court, and this was affirmed by the Divisional Court. On appeal to the Court of Appeal before Esher MR, Lindley and Lopes LJJ, the Court of Appeal ordered judgment to be entered for the plaintiffs, with execution thereon being stayed until the trial of the counterclaim.

The Court of Appeal in *Sheppards* v *Wilkinson*[2] recognized that a counterclaim may be used by a party as a defence to a claim in certain instances. The court stated that a defendant ought not to be shut out from defending unless it was very clear indeed that he had no case in the action under discussion. There might be either a defence to the claim which was plausible or there might be a counterclaim pure and simple. To shut out such a counterclaim would be an autocratic and violent use of O 14. The court had no power to try such a counterclaim on such an application, but, if they thought it so far plausible that it was not unreasonably possible for it to succeed if brought to trial, it ought not to be excluded. If the counterclaim was for a less sum than that claimed, then judgment might be signed, if there was no real defence, for so much of the amount of the claim as was not covered by the counterclaim. But if the counterclaim overtopped the claim and was really plausible, then the rule which had been often acted upon at chambers, of allowing the defendants to defend without conditions, was the right one. There were however circumstances which might call on the court to act differently. If it was clear that the claim must succeed and there was really no defence to it, and the plaintiffs would only be put to expense in proving their claim, then there ought to be judgment on the claim, but the matter must be so dealt with that the defendants who had a plausible counterclaim must not be injured; and that would be done by staying execution on the judgment until the counterclaim had been tried.

The Court of Appeal was unanimous in endorsing that the proper order must be for judgment to be entered for the plaintiffs, with a stay of execution pending trial of the counterclaim or further order. The reasoning seems clear that the claim by the plaintiffs and the counterclaim by the defendants must be taken separately. If there is no defence to a claim other than a plausible counterclaim, then judgment must be entered on the claim. To prevent injury to the defendants and to prevent an autocratic and violent use of O 14 by shutting out the defendants, a stay of execution on the judgment must be granted, pending the trial of the counterclaim or until further order. The overriding consideration is that if the claim is undisputed other than by means of a counterclaim, the claimant must not be put to the expense of proving his claim, even if no great expense would be incurred in proving that claim at a trial.

The principles cited in *Sheppards* v *Wilkinson*[2] have been applied with approval in several cases in both Singapore and Malaysia: *Societe des Etains de Bayas Tudjuh* v *Woh Heng Mining Kongsi*,[3] *Ronald Quay Sdn Bhd* v *Maheswary Sdn Bhd*,[4] and *PH Grace Ltd & Ors* v *American Express International Banking Corp*.[5]

In the present appeal, after a detailed analysis of the counterclaim, the plaintiffs have by their pleadings admitted in the clearest terms that a sum of $116,585.07 is due to the second defendants, computing this to the very last cent. In the circumstances, the second defendants are entitled to judgment with a stay of execution.

Second issue

On the second issue, Mr Kumar referred to the court's general and special powers of amendment under O 2 r 2 and O 20 r 5. He contended that the guiding principle is that all amendments should be allowed so that the real questions in controversy may be tried or that any defects or errors in any proceedings may be corrected, so long as this can be done without injustice. In the present case, the plaintiffs are only seeking a formal amendment and not a substantive amendment. The second defendants could not say that they would not be adequately compensated in costs for the amendment sought. The three cases in *The Supreme Court Practice 1988* which purport to support the cautious statement that, after final decree or judgment, the court may not amend pleadings (*A-G* v *Birmingham Corp*;[6] *Durham* v *Robertson*;[7] and *A-G* v *Garner*[8]) were all decided well before O 2 came into its present form, doing away with the distinction between proceedings which were a nullity and those which were a mere irregularity and giving the court a wide general power to put things right. He relied on the more recent decision of the Court of Appeal in *Singh* v *Atombrook*.[9] In that case, the Court of Appeal recognized that the powers conferred by O 2 r 2 and O 20 r 5 were in the widest terms, and stated clearly that in principle an amendment even after final judgment could be allowed. Mr Kumar further contended that, even if the plaintiffs have made an admission in their pleadings upon which judgment may be founded, this was an error of law, there has been no trial of the real issues, and the error can be put right: *Hollis* v *Burton*;[10] *State of Perak* v *Muthukaruppan Chettiar*.[11]

Order 20 r 5(1) provides that:

> ... the Court may at any stage of the proceedings allow the plaintiff to amend his writ, or any party to amend his pleadings on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

In *Singh* v *Atombrook*,[9] Kerr LJ referred to the cautiously worded note to O 20 r 5 in *The Supreme Court Practice 1988* summarizing the three authorities for the proposition that 'after final decree or judgment the judge of first instance cannot, or at all events will not, amend the pleadings or add new parties'. He preferred at p 390 a decision of Oliver J in *Midland Bank Trust Co Ltd* v *Green (No 2)*[12] at p 733 which he construed to mean that pending enforcement there is still power for the court to amend the proceedings even after final judgment. The learned judge continued at p 390:

> However, no case having been cited which precludes the court from amending the pleadings under O 20 r 5 after final

judgment, and having regard to the cautious way in which the note in *The Supreme Court Practice* is expressed, I would hold that there is no reason in principle, particularly given the width of the new O 2 r 1, which precludes the court in appropriate cases from amending the pleadings and proceedings even after final judgment.

The facts in *Singh* v *Atombrook*,[9] however, were different to those in the present appeal, and Kerr LJ was dealing with a very different situation. In that case, a default judgment had been entered irregularly, in that the writ contained errors which could be amended under O 2, which enabled the court to set aside the judgment and permit amendments to pleadings to be made. In this connection, Kerr LJ said at p 393:

> This is a case which falls plainly within the scope of the new O 2 r 1. The judgment had been obtained irregularly in the two respects to which I have referred. But it could still be amended, although it was a final judgment, both under O 2 r 1(2) and O 20 r 5.

While a court may have a wide power of amendment even after a final judgment, the appropriate cases in which such a power should be exercised must necessarily be very limited. Whether or not a court should do so will be in the discretion of the court, and will depend on the facts of each case, including in particular the nature and implications of the amendment sought. In all cases, a court will have to bear in mind the fundamental principle of all courts that there must be a finality to litigation.

In the present case, the plaintiffs made an admission of fact on which a judgment could properly be founded, and the defendants obtained a 'regular' judgment for the sum admitted by the plaintiffs. The registrar then dismissed an application to amend the plaintiffs' defence in respect of this admitted sum, on the grounds that the plaintiffs could not amend their pleadings after judgment had already been entered against them based on that admission in the pleadings. What the plaintiffs are seeking in this appeal is an order which will reverse the order of the registrar, and will result in effect in the removal of the admission on which the judgment against them was based. In my judgment this was not an appropriate case in which an amendment should have been allowed, and the registrar was right in not allowing the amendment sought by the plaintiffs.

Accordingly the appeals on both issues are dismissed with costs.

Appeals dismissed.

Solicitors: *Chor Pee & Co; Shook Lin & Bok.*

Reported by *Terence Tan Bian Chye*

Re Linus Joseph

HIGH COURT (SINGAPORE) — ORIGINATING SUMMONS NO 728 OF 1988
WEE CHONG JIN CJ, CHAN SEK KEONG AND CHUA JJ
31 AUGUST 1990

Legal Profession — Disciplinary action — Application for order absolute — Grossly improper conduct — Alleged misconduct taking place in Brunei — Jurisdiction of disciplinary committee — Whether committee was competent to decide on the issue of its jurisdiction — Whether on the charge or on the facts there was cause of sufficient gravity for disciplinary action — Legal Profession Act (Cap 161, 1985 Ed), s 80(2)(b)

This was an application under s 95(6) of the Legal Profession Act (Cap 161, 1985 Ed) ('the Act') for an order absolute against Joseph Linus ('JL'), an advocate and solicitor of the Supreme Court of Singapore. JL was also at all material times, an advocate and solicitor of the High Court of Brunei. He was charged before the disciplinary committee ('the committee') of dishonestly withholding (in Brunei) fees received from clients from his law firm in Brunei and was thus guilty of grossly improper conduct under s 80(2)(b) of the Act. The committee had decided that it was incompetent to deal with the question of whether it had jurisdiction over JL in respect of his conduct overseas. The committee nevertheless found that cause of sufficient gravity for disciplinary action existed under the section.

Held, dismissing the application:

(1) When a party to a proceeding before an inferior tribunal like the committee challenges its jurisdiction, the tribunal must decide whether it has jurisdiction or not. Without jurisdiction, it has no power to proceed further, and therefore to proceed on the assumption that it had jurisdiction may be to proceed in vain.

(2) The committee's determination under s 90 is not merely a power which it may exercise but a duty which it must discharge. It cannot make a determination in terms of para (c) of s 90(1) unless the misconduct alleged, as a matter of law, subjects the advocate and solicitor to disciplinary action under that section. In order to make that determination, the committee must also decide if the alleged misconduct, if proved, falls within the ambit of s (80)(2)(b).

(3) Under s 80(2)(b), it was vital for the committee to distinguish between the capacities in which JL was alleged to have misconducted himself. A Singapore solicitor is only liable to disciplinary action if he is guilty of grossly improper conduct in 'the discharge of his professional duty'. The last six words could only refer to the discharge of his professional duty in his capacity as an advocate and solicitor of the Supreme Court of Singapore. Where a Singapore solicitor is also qualified to practise as a solicitor in a foreign country, then any misconduct by him in the discharge of his professional duty as a foreign solicitor does not fall within the first limb of s 80(2)(b) even if the misconduct is committed in Singapore.

(4)The charge against JL could only be a reference to his conduct as an employee of the firm, ie in the discharge of his professional duty as a member of that firm and not as a Singapore solicitor.

Cases referred to

1 *R* v *Fulham, Hammersmith & Kensington Rent Tribunal* [1951] 2 KB 1 (folld)
2 *Federated Engine-Drivers and Firemen's Association of Australasia* v *Broken Hill Proprietary Co Ltd* (1911) 12 CLR 398 (folld)